No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

H. W. Hutton,
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This matter was argued and submitted May 27th, 1915. August 23rd the United States filed a brief, and on September 7th, 1915, plaintiff in error obtained permission from the Court to file the following reply.

I.

Replying to what appears on pages 1 to 7 of the Government's brief we beg to state, that plaintiff in error was not a waiter, he was porter, and had nothing to do with the passengers either male or female, except as they might need electric lamps placed in their rooms as the lamps burned out.

It is true as stated on page of the Government's brief, that our position is, that:

> "The legislative authority of the Union must first make an act a crime, affix a punishment to

it and declare the court that shall have jurisdiction."

That is the language of the U. S. Supreme Court. The most essential part of a penal statute is the prohibited act, without a prohibited act there can be no punishment nor any court declared to impose punishment, and the prohibited act is wanting in this attempted penal statute.

Congress has nowhere in effect or otherwise declared "that the common law definition of rape shall be the crime denounced by the statute." Nor would it have the power so to do in the light of what the United States Supreme Court has frequently said. And no such doctrine is well or at all settled. When such a doctrine was first asserted the United Supreme Court frowned upon it, held it could not be done, and that has been the established doctrine of this country ever since.

Neither hundreds, nor thousands or any cases have been prosecuted under similar statutes, counsel has not cited any, for the good and sufficient reason that none can be found, the nearest attempt was in *U. S.* vs. *Coolidge et al.*, 1 Gallison 488, cited in our first brief, and the United States Supreme Court on appeal said that such a practice could not be permitted.

If Congress has been derelict in duty, or overlooked this particular crime, it is the fault of Congress, in the absence of proper action by it, there are no crimes, and Congress must bear the burden of its oversight. We have, however, no doubt the

United States Attorney will call the attention of Congress to this attempted crime at its next session.

In Murder, "murder is the unlawful killing of a human being with malice aforethought."

Congress has defined *the act* as the unlawful killing of a human being, malice aforethough is but a state of mind, evidenced by the circumstances that surround the crime. With the words "malice aforethought" eliminated, the crime of murder would still be properly defined as the act has been defined.

II.

Review of the Government's Authorities.

Clark on Criminal Law, is one of the series of publications known as "The Hornbrook Series", cheap works, incomplete, and they do not undertake to be standard, it designates itself as a "*Handbook* of Criminal Law."

The merits of the book, and the quotation in the Government's brief herein is best shown by the following parts of the quotation:

> "Thus, an act of Congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not define those crimes."

Then take the following from the decision in *U. S.* vs. *Coolidge,* 1 Gallison 490:

> "For instance, Congress has provided for the punishment of murder, manslaughter and perjury, under certain circumstances; but it has nowhere defined these crimes."

It is very evident that Mr. Clark when he wrote his book on Criminal Law, had the case of *The United States* vs. *Coolidge,* 1 Gallison, before him, and borrowed his ideas from that decision, almost borrowing the language, but did not take pains to ascertain whether that case had been affirmed or reversed by the United States Supreme Court. He could not have even read the whole of the decision, as on page 495 we find the following:

> "I have considered the point as one open to be discussed, notwithstanding the decision in the *United States* vs. *Hudson & Goodwin,* February term 1812, which certainly is entitled to the most respectful consideration; but having been made without argument and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, and it is not a question of mere ordinary import, but vitally affects the jurisdiction of the United States; a jurisdiction which they cannot lawfully enlarge or diminish."

Mr. Clark did not take the pains to ascertain what the answer of the United States Supreme Court to that language was. The answer, however, was, that in statutes such as the one in question in this case the United States Courts have no jurisdiction. He was in error again when he wrote:

> "An act of congress declares murder, manslaughter, rape and other crimes, upon the high seas or in certain specified places, to be crimes punishable in the federal courts, but does not define those crimes."

All crimes have been defined except rape and assault with intent to commit rape, the penal code and statutes are evidence of that.

Again it is impossible to reconcile what we find on pages 425 and 426 of his work, and what is printed in the Government's brief from page 427.

This whole matter is correctly stated in Vol. 1, Page 103, Sec. 11, Sub'd of Rose's Code of Federal Procedure, as follows:

> "It has been frequently declared that the courts created by Congress to exercise the Federal judicial power, have no power to declare *any act* to be a crime against the Federal government *because it is such at common law* principally where Congress has not declared it criminal and authorized its punishment in such courts. And though the first decision of the matter was by the court without the benefit of argument by counsel, and its correctness was afterwards questioned, numerous cases have since affirmed the principle that there are no common law offenses against the United States, and *an act must come within some penal law of Congress to be punished therein as a crime.*"

The Encyclopedia of United States Supreme Court Reports is published, not by the United States Government, but by "The Michie Company Law Publishers, Charlottsville, Va.," under the editorial supervision of Thomas Johnson Michie.

On page 55 of Volume 5 we find the case of *U. S.* vs. *Brewer,* 139 U. S. 278, cited. The Supreme Court, on page 288, says as follows:

> "Laws which create crime ought to be so explicit that all men subject to their penalties

> may know what acts it is their duty to avoid. Before a man can be punished, his case must be plainly and unmistakably *within the statute.*"
> *U. S.* vs. *Lacher,* 134 U. S. 628.

We will now see whether the cases cited bear out what the writer of the Encyclopedia claims for them.

United States vs. *Smith,* 5 Wheaton 153, was a piracy case, and is hereafter reviewed herein.

Benson vs. *McMahon,* 127 U. S. 457, was an *extradition case;* we submit that it is not necessary to set out the acts constituting the crime in both countries, in a treaty.

Wright vs. *Henkel,* 190 U. S. 40, was also an extradition case.

United States vs. *Palmer,* 3 Wheaton 610, was a piracy case.

United States vs. *Carl,* 105 U. S. 611, was a case where the only question involved was, whether the indictment was within the language of the statute.

In *Pettibone* vs. *the U. S.,* 148 U. S. 197, all the Court had under consideration was the meaning of the word "conspiracy."

In re Kollock, 165 U. S. 533, is squarely against the Government in this case, the Supreme Court saying on that page:

> "We agree that the courts of the United States, in determining what constitutes an offense against the United States, *must resort to the Statutes of the United States enacted in pursuance of the constitution.*"

We are unable to find anything in *Caha* vs. *United States,* 152 U. S. 211, that in any way bears upon the points it is cited to support.

We find in *U. S.* vs. *Eaton,* 144 U. S. 677, the following on page 687:

> *"It is well settled that there are no common law offenses against the United States."*

It will thus be seen, that whatever we do find in the authorities cited in the encyclopedia that are pertinent, all of which are inserted bodily in the Government's brief, are squarely opposed to the editor's language, and against the contentions of the Government in this case.

It is a well-known fact, that Congress has never defined crimes by titles, as stated on page 5 of the Government's brief. It did start in to do that, but was halted by the decisions we have referred to.

If a man can be punished, where the act constituting the crime is not set out in the statute, why has counsel not cited a case where it has been done? As we have stated, we have cited cases where it has been held that it could not be done.

We never claimed that if the charge of piracy in the Smith case had been any other form of piracy but that of the commission of murder or robbery on the high seas, the statute would have been inoperative.

In the Smith case, the statute said:

> "Whoever on the high seas, commits the crime of piracy *as defined by the law of nations, etc.*"

The sole question involved was, whether the crime of piracy was properly defined. The Supreme Court, on a divided court, held that piracy under the law of nations was a well understood crime, and the statute sufficiently and properly defined the crime.

If the section involved in this case, Penal Code 278, even read:

> "Whoever shall commit the crime of rape as defined by the common law, shall suffer death."

We would have a statute as broad as the statute in the Smith case. As it is, it falls far short of that. The Smith case is therefore in support of Plaintiff in Error's contentions.

III.

Evidence and Instructions.

There is nothing in the evidence to show that Mrs. Young was or is a frail woman.

There is some evidence to show that she underwent a capital operation a great many years ago and had fully recovered from it.

It is idle to say she was without protection from the management of the vessel or otherwise. Watch-

men were continually going by her room, passengers were within three feet of her, and the slightest outcry on her part would have brought a flood of people to her. So she could not have been at the mercy of the plaintiff in error.

She was of mature years, and it is idle for counsel to say she could have feared being thrown overboard. To have done so, plaintiff in error would have had to carry her from her room, along the saloon of the vessel, up stairs, then through the social hall, with people constantly moving around, and two watchmen and officers of the vessel constantly around.

After the time she claims plaintiff in error undressed her, others went to her room. She seems to have been satisfied for them to go, she even rang up for the night watchman, and still knowing that there were women, children and men within a few feet of her, she made no complaint until the next morning. Her room was not a sealed room, it was partly made of lattice work; what was not of lattice work was of thin tongue and grooved board, which would carry the slightest sound, still no sound or outcry was made.

There is nothing in the case on which to base the following statement on page 8 of the Government's brief:

> "Everything, including the condition of the undergarment," etc.

An undergarment was offered in evidence, objection made and it was not admitted.

As to whether the evidence supports the verdict, our contention has always been that the very most it shows is a simple assault. The case of *People* vs. *Stewart,* 97 Cal. 238, is cited in the Government's brief.

In that case Stewart and the complaining witness were driving along a public highway, and he addressed certain language to her touching his desires and purposes.

There is nothing to that effect in this case. Stewart stopped the buggy, got out and apparently fastened the horse to a bridge railing, and asked the complaining witness whether she would get out of the buggy without any trouble; she said no; he said he would pull her out, and the complaining witness told him he would not. He then caught hold of her, she caught hold of the buggy, he pulled her hands loose and pulled her out, he then threw her down on the bridge, falling with her, and just then he heard a team coming and he jumped up saying "here comes a team, get into this buggy," but the complaining witness ran for the team that was coming.

There is a wide difference between that case and this. In this, there is not one word showing that defendant ever said he intended to have sexual intercourse with Mrs. Young. He was not frightened away, he could have had sexual intercourse if that

had been his intent; *the fact that he did not do so shows lack of intent.*

The evidence in the case of the *People* vs. *Brown,* 47 Cal. 447, was much stronger than it is in this case, and it was held insufficient, the Court saying on page 450:

> "There was no resistance upon the part of the woman, or if there was any, it was of such equivocal character as to fairly suggest actual consent, or at most not a very decided opposition upon her part."

We claim that the opposition of Mrs. Young, if opposition there was, was of such an equivocal character that it amounted to no opposition at all. The fact that she did not cry out, or did not when defendant left her, immediately arise and seek assistance, or report to someone, shows that she made no opposition.

People vs. *Manchego,* 80 Cal. 306.

In that case the proof was stronger than in this, a verdict of simple assault returned and held proper.

The case of *People* vs. *Fleming,* 94 Cal. 308, is very like this case, and the Court held the evidence insufficient, saying on pages 311 to 313:

> "By her testimony it is apparent that defendant desired to have sexual intercourse with her, and that he committed either an assault or a battery upon her, of a technical character at least, while engaged in his solicitations and blandishments, but these things may all be true and be entirely foreign to any intention on his

part to commit the crime of rape by the use of force to the extent of overcoming all resistance she might offer.

Citing *Commonwealth* vs. *Merrill,* 14 Gray 415.

These facts would have been sufficient to warrant a jury in finding the prisoner guilty of an assault. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, *or equally consistent with the absence of the felonious intent charged in the indictment,* then it is clear that they are insufficient to warrant a verdict of guilty."

Page 313:

"A rape was not accomplished, hence the intent of the defendant must be determined from his acts and conduct. If he had intended to use force in carrying out his purpose why was it not done? *Why was not the crime of rape committed?* It is conceded the woman was not possessed of a sufficient power of resistance, if he had used physical force. The law says there is no intent to commit a rape unless a defendant is resolved to use all force necessary to carry out his designs. He could have carried out his designs by using force, but at the very moment when his success was assured, when, according to her statement, she was exhausted, and her refusals and oppositions to his desires had entirely ceased, at that moment he voluntarily left her bed and retired to an adjoining room, where he passed the remainder of the night. *His departure was no flight, for there was no alarm;* there was no danger of discovery; and the conduct of the defendant at

> this time was entirely inconsistent with that of the would-be ravisher. The acts and conduct of the defendant were not only equivocal and consistent with the absence of a felonious intent to commit rape, but the evidence preponderates to the effect that the accused depended for success in the accomplishment of his design upon the solicitations and blandishments of the seducer, rather than upon the physical force necessary to constitute the crime here charged." Cases cited.

That case cites and reviews a number of English and other authorities, and should be conclusive of this. If Mrs. Young was a weak frail woman, as counsel states, why did not the defendant have sexual intercourse with her if that was his intent? Why did he not have sexual intercourse with her when she became exhausted? There was nothing that she did at any time that would have stopped him, she simply laid there and talked, with one hand under her head. She says:

> "I did not fight at all, I appealed to his better nature to leave me alone," etc.

That shows it was simply a matter of attempted persuasion on his part. Again she says:

> "I became completely exhausted, and if Mr. Oliver had wanted to force me to have sexual intercourse with him I could not have resisted."

Where is there any intent to commit a rape at all hazards in this case?

Counsel is in error when he states that the law was fully covered by the instructions given. We

will take instruction I given, as it appears in the Government's brief, as follows:

> "To constitute the crime of assault with intent to commit rape the assault must have been made with the intent to commit rape, notwithstanding all possible resistance that could be made, and with the resolve on the part of the party charged to use all force necessary to carry out his designs. The intent must have been to perpetrate the crime at all events, regardless of what the party upon whom the assault is made might or could do to prevent it."

That instruction is sound as far as it goes, but it is followed by the following, a part of the same instruction:

> "There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., *but without the use of force*, such an assault does not constitute the offense here charged.

All the authorities recognize the fact that force can be used to secure consent and the crime of an assault with intent to commit rape is not committed if the endeavor is to procure consent, even though force is used to obtain consent.

The jury were in effect charged that if any force at all was used it would be an asault with intent to commit rape and there could be no such thing as an assault with an intent to have an improper connection if any force whatever was used, whether the intent was to accomplish an act of sexual inter-

course, or merely to obtain the consent of the female.

We then have the following language, which taken with what we have heretofore quoted, must have misled the jury:

> "But if the defendant did make *such assault* upon the person of Mary Elizabeth Young," etc.

The Court says such assault, and does not say which of the preceding assaults it meant. It is thus clear that instructions found on pages 15 and 16 of our first brief should have been given.

We do not find any other matter in the Government's brief that requires an answer, and submit that the judgment herein should be reversed.

Respectfully,

H. W. Hutton,
Attorney for Plaintiff in Error.

In the case of U. S. V, Smull, 206 U. S. 466, decided this year, it is said:
"A charge of crime against the United States must have clear legislative basis"
(Cases cited)